(19,641.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 541.

DANIEL R. KENDALL, APPELLANT,

vs.

THE AMERICAN AUTOMATIC LOOM COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 28, 1905.

1 [SEAL.] The President of the United States of America to the American Automatic Loom Company, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of January, A. D. 1905, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Daniel R. Kendall and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 13th day of December, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America, the one hundred and twenty-ninth.

JOHN A. SHIELDS, Clerk.

MERRILL & ROGERS,
Solicitors for Complainant.

The defendant is required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of January, 1905, or the bill will be taken *pro confesso* against it.

J. A. S., Clerk.

2 I hereby certify, that on the 13th day of December, 1904, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant The American Automatic Loom Company at No. 901 Broadway, N. Y. city, N. Y. by exhibiting to Joseph H. Emery, as treasurer of said company the within original, and at the same time leaving with him a copy thereof, and at the same time and place left with him a copy of the bill of complaint in this suit.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated December 14th, 1904.

U. S. circuit court, southern district of New York. Filed Dec. 14, 1904. John A. Shields, clerk.

3 Circuit Court of the United States, Southern District of New York.

DANIEL R. KENDALL, Plaintiff,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

To the honorable the judges of the circuit court in and for the southern district of New York:

The plaintiff, your orator, Daniel R. Kendall, complains of the defendant and for his cause of action respectfully shows unto the court:

First. That the plaintiff is a citizen of the United States, and a resident and citizen of the city, county and State of New York, and of the southern district of New York, and is, and since the 24th day of May 1898, has been, a stockholder of said defendant company, owning and holding four thousand (4,000) shares of the stock of the said company.

Second. Your orator further complains and says that the defendant is, and at all the times herein mentioned was, a stock corporation organized and existing under the laws of the State of West Virginia, with a capital stock of five million (5,000,000) dollars, consisting of shares of the par value of ten (10) dollars each, and was incorporated to engage in the business of manufacturing and selling looms and weaving machinery, and to carry on the business of weaving and making woven fabrics of all kinds, and by its charter
4 of incorporation was to have its principal office or place of business in the city, county and State of New York.

Third. Your orator further shows unto your honors, upon information and belief, that the principal office and place of business of the said corporation is, and at all times has been, located in the city and southern district of New York, and all of its regular business has been conducted in and from the said city, and a considerable part of the assets of said company are and have been in said southern district of New York.

Fourth. Upon information and belief, your orator further shows that at the present time and for a long time past the assets of the defendant, at a fair and reasonable value, are and have been wholly insufficient to pay its debts, and the liabilities of the defendant over and above its assets as aforesaid are and have been for some time upwards of ten thousand (10,000) dollars.

Fifth. Your orator further shows, upon information and belief, that the said defendant company was organized as aforesaid for the purpose of acquiring the right to make, use and vend a certain automatic loom attachment in the United States of America, Canada and the Republic of Mexico; that a corporation organized under the laws of the State of Nebraska, known and designated as the

Automatic Loom Company, owned the patent or patents for the said automatic loom attachment, or the English or European rights therein, and upon the organization of the said defendant company, its board of directors valued the American rights in the automatic loom attachment as aforesaid at the sum of three million (3,000,000) dollars or more, and issued the stock of the defendant company in that sum therefor, and acquired the said rights.

5 Sixth. Your orator further shows, upon information and belief, that one Joseph H. Emery, who is a resident and citizen of the city, county and State of New York and of the southern district of New York, was one of the promoters and organizers of the said defendant corporation, and is, and at all times has been, since its organization, a director and the treasurer of the said defendant corporation.

Seventh. Your orator further alleges that one Fanny C. Emery, who is the wife of the said Joseph H. Emery, and who lives with him, informed your orator that the automatic loom attachment aforesaid had passed beyond the state of experiment and had become an assured success; that a model machine had been constructed, which worked perfectly and was then entirely ready for the market, and that nothing remained to be done but to manufacture the machines and to sell them; that your orator was so impressed with these representations that he asked the said Fanny C. Emery whether she could get him some stock of the defendant company, and she thereupon stated to your orator that she thought so, but not at the price which some of plaintiff's friends had paid for their stock, viz: one dollar a share; that shortly thereafter the said Fanny C. Emery informed your orator that she could not get stock at less than one dollar and a half per share, and thereupon plaintiff purchased the said stock at said price and paid therefor.

On the 24th day of May 1898, he purchased thirty-five hundred (3500) shares and paid the said Fanny C. Emery therefor the sum of five thousand two hundred and fifty (5,250) dollars. On the 21st day of December, 1898, he purchased five hundred (500) shares and

6 paid the said Fanny C. Emery therefor seven hundred and fifty (750) dollars; and your orator further alleges on information and belief that each and every of said statements of the said Fanny C. Emery was false and fraudulent, and known to her to be false when made, and was made with intent to mislead your orator, and to induce him to buy said stock and to pay therefor, and your orator believed said statements so made and was induced thereby to purchase said stock as aforesaid and to pay for the same; that the said defendant company did not at the time aforesaid own a patent which had passed the stage of experiment; that it has issued all or nearly all of its capital stock for the American rights in a patent automatic loom attachment for which no machine had then been constructed which was a commercial success or has yet been constructed which was or is in successful operation; upon information and belief that the said Fanny C. Emery had obtained an option

through her said husband, Joseph H. Emery, or otherwise, to buy stock of the defendant corporation at twenty-five cents a share, or less, and that the stock sold to plaintiff was secured by the said Fanny C. Emery or the said Joseph H. Emery at the price of twenty-five cents a share, or less, and that the stock of the American Automatic Loom Company could, at the time of the sale aforesaid, be purchased in large quantities for twenty-five cents a share, or less, and that the same had little or no market or intrinsic value.

Your orator further alleges that he was ignorant of the real condition of the defendant company at the time of the purchase of the said stock aforesaid, and that he does not know whether the said stock was sold to him by the said Fanny C. Emery individually or in co-partnership with her said husband, Joseph H. Emery,
7 or whether the said Joseph H. Emery participated with the said Fanny C. Emery in the whole or any part of the proceeds of said sales to your orator, or whether the said stock so purchased was the treasury stock of the defendant corporation for which the said Fanny C. Emery or the said Joseph H. Emery, jointly or separately, were the agents in making the said sales.

Eighth. Your orator further alleges, upon information and belief, that the said defendant corporation has expended considerable sums, amounting to more than two thousand (2,000) dollars, in constructing and endeavoring to improve the said automatic loom attachment, and in making a model thereof, and in obtaining the issuance of further patents thereon, the exact location of which models and patents are at present unknown to your orator; but your orator avers upon information and belief that the reasonable value of the said model and patents and tangible assets of said defendant corporation exceeds the sum of two thousand (2000) dollars.

Ninth. Your orator further shows this court, upon information and belief, that the said director Joseph H. Emery, has taken entire and unlawful charge of the defendant in managing its business, and disposing of the assets and property of the defendant without the consent of this plaintiff or of any of the stockholders, and not in accordance with the laws of this State or of the State of West Virginia applicable thereto, and all of the directors of the defendant without authority of law or the consent of the stockholders have ceased to use their powers and abdicated their offices as directors.

Tenth. Your orator further shows this court, upon information and belief, that the said Joseph H. Emery as treasurer, and the board of directors of the defendant corporation have failed
8 and refused to pay any and all of the taxes levied and assessed against the defendant corporation, either in the State of West Virginia or in the State of New York, and that by reason thereof the defendant corporation is indebted to the State of West Virginia in the sum of more than five thousand (5000) dollars, by reason of which the attorney general, and other proper officials of the State of West Virginia, *has* instituted suit against this corporation by the due and personal service of process upon the defendant

corporation within the said State of West Virginia to have a decree of forfeiture of its charter and franchises and to dissolve the said corporation entered in the circuit court of Kanawha county, in the State of West Virginia, and that the said representatives of the defendant corporation have failed and neglected to appear in said action of dissolution or to defend the same, and are in default in said action, by reason of which a final decree of dissolution of said corporation is expected to be entered in said court at the January term, 1905, and in the event of said decree being entered as aforesaid, before the trial of this action, the plaintiff hereby gives notice to the defendant of his intention to produce it in evidence.

Eleventh. Your orator further shows this court, upon information and belief that the directors of the said corporation have failed and refused to call the annual meeting of the stockholders of the defendant corporation, as required by the charter of the said corporation and by its by-laws and by the laws of the State of West Virginia since the 11th day of May, 1900, and on or about the 17th day of April, 1904, this plaintiff duly served upon the said defendant corporation and upon the said Joseph H. Emery as treasurer of
9 the said defendant corporation, a written demand that the annual meeting of the stockholders of the defendant corporation be called for the second Tuesday of May 1904, as provided in the said defendant's by-laws and other laws applicable to the said defendant corporation, with which demand the said corporation and the said Emery refused and neglected to comply, and that this plaintiff on the said 7th day of April, 1904, further demanded in writing, by service as aforesaid, an inspection of the list of stockholders of the defendant corporation to which he was entitled under the laws of the State of West Virginia, and under the by-laws of the said defendant corporation, and the said demand was also refused as aforesaid.

Twelfth. Your orator further shows this court, upon information and belief, that if the property of the said corporation can be preserved under the protection of the court a considerable part of the value of the said property, which would otherwise be lost, would be preserved for the creditors and stockholders of the company.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And that a receiver of the said corporation and of all of its assets and property of every description that is within this State,
10 or elsewhere, shall be appointed by the decree of this court and likewise during the pendency of this suit with the usual

powers and authority of receivers in such cases to take, receive and care for said property, and to make the directors of the said defendant account therefor, and that the defendant company may be required to turn over and convey to said receiver all of its said property; that all of said property be sold and realized upon, and the debts and liabilities of the said defendant be liquidated and paid off, and the surplus, if any, be distributed according to law, and that an injunction may be granted both by the final decree and pending this suit restraining any interference with the said receiver or property, and for such other and further or different relief as may be just and proper.

May it please your honors to grant unto your orator not only a receivership and a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said defendant company, commanding it on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

MERRILL & ROGERS,
Solicitors for Complainant and of Counsel.

Office and post office address, 31 Nassau street, borough of Manhattan, New York city.

11 STATE OF NEW YORK, }
County of New York, } ss.:

Daniel R. Kendall, being duly sworn, deposes and says: That he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

DAN'L R. KENDALL.

Subscribed and sworn to before me this 8th day of December, 1904.

JOHN C. BARR,
[SEAL.] Notary Public, Kings Co.

Certificate filed in N. Y. Co.

(Endorsed:) Circuit court of United States, southern district of New York.—Daniel R. Kendall, plaintiff, against The American Automatic Loom Co., defendant.—Bill of complaint.—Merrill & Rogers, attorneys for plaintiff, 31 Nassau street, New York city.—U. S. circuit court, southern district of New York. Filed Dec. 13, 1904, John A. Shields, clerk.

12 At a stated term of the United States circuit court for the southern district of New York, held in the post office building in the city of New York, on the 21st day of December, 1904.

DANIEL R. KENDALL, Complainant,
vs.
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

On reading and filing the special appearance of the defendant by Messrs. Simpson, Werner & Cardozo, its solicitors, for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the service of the writ of subpœna and the bill of complaint heretofore made herein, and for no other purpose, it is

Ordered, that the said special appearance be and the same is hereby entered and filed herein.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) Circuit court of United States, southern district of New York.—Daniel R. Kendall against The American Automatic Loom Company.—Order.—Simpson, Werner & Cardozo, solicitors for defendant, 52 Broadway, Manhattan, New York.—U. S. circuit court, southern district of New York. Filed Dec. 21, 1904, John A. Shields, clerk.

13 Circuit Court of the United States for the Southern District of New York.

DANIEL R. KENDALL, Complainant,
vs.
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

Please take notice, that the above named defendant appears specially in this suit, for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the service of the writ of subpœna, and the bill of complaint heretofore made herein, and for no other purpose; and that we are retained as its solicitors for that purpose and no other.

Dated New York, December 19, 1904.

SIMPSON, WERNER & CARDOZO,
Solicitors for Defendant,
52 Broadway, New York City, Borough of Manhattan.

To Messrs. Merrill & Rogers, solicitors for complainant, 31 Nassua St., N. Y.

(Endorsed:) Circuit court of the United States, southern district of New York.—Daniel R. Kendall, against The American Automatic Loom Co.—Notice of special appearance.—Simpson, Werner &

Cardozo, solicitors for defendant, 52 Broadway, New York.—A copy of the within paper received Dec. 20/04. Merrill & Rogers, attorneys for plaintiff.—U. S. circuit court, southern district of New York, Filed Dec. 21, 1904, John A. Shields, clerk.

14 Circuit Court of the United States for the Southern District of New York.

DANIEL R. KENDALL, Complainant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

Please take notice, that on the annexed affidavit of Joseph H. Emery, and the bill of complaint and writ of subpœna herein, a motion will be made by the undersigned, at a stated term of this court, to be held at the post office building in the borough of Manhattan, in the city of New York, on the 23rd day of December, 1904, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order setting aside the service of the writ of subpœna and bill of complaint herein, which was attempted to be made on or about the 13th day of December, 1904, and extending the defendant's time to appear generally herein, until five days after the hearing and decision of this motion, and for such other and further order or relief in the premises as may be just and proper.

Dated, December 19, 1904.

SIMPSON, WERNER & CARDOZO,
Solicitors for the Defendant, The American Automatic Loom Company, Appearing Specially for the Purpose of Questioning the Jurisdiction of the Court and of Setting Aside the Aforesaid Service and for no Other Purpose, 52 Broadway, New York City, Borough of Manhattan.

To Messrs. Merrill & Rogers, solicitors for complainant, 31 Nassua street, N. Y.

15 Circuit Court of the United States for the Southern District of New York.

DANIEL R. KENDALL, Complainant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

STATE OF NEW YORK,
County of New York, } ss.:

Joseph H. Emery, being duly sworn, deposes and says: On the 13th day of December, 1904, a copy of the bill of complaint herein,

and of the writ of subpœna requiring the defendant to answer the said bill of complaint, was served upon me in the city of New York. I am informed and believe that the reason why service was attemped to be made upon the defendant corporation in the manner aforesaid is because I have been the treasurer of said defendant. The domicil and residence of the defendant is in the State of West Virginia. The said defendant now appears especially for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the said attempted service.

The defendant, The American Automatic Loom Company, was incorporated under the laws of the State of West Virginia in or about the month of March, 1898. The purpose of its incorporation was the development, perfection and promotion of a self-feeding loom attachment, which gives to an ordinary loom a continuous supply of filling thread. It was the owner of divers patents which it was believed would accomplish that result; it has never manufactured merchandise; it has never made a sale; and it has never
16 engaged in the transaction of the business for which it was incorporated. It has no assets or property in the State of New York; it has no office or place of business in said State. Those of its officers who reside in said State are not here officially or as representing any business or interests of the said corporation.

When the said corporation was first formed, the meetings of its stockholders and directors were held at the office of the company's counsel, in the Mills building No. 35 Wall street, New York city. This continued at intervals during the greater part of the year 1898. After that time, and until August 10, 1901, meetings were held irregularly at any place where accommodations could be secured. Thus, on December 27, 1898, a special meeting of the directors was held at the Murray Hill hotel, where one of the chief stockholders resided; on June 20, 1898, a meeting of the directors was held at No. 479 Fifth avenue; on February 23, 1900, a special meeting of the directors was held at the Murray Hill hotel; on March 13, 1900, a meeting of the directors was held at the Murray Hill hotel; on March 14, 1900, a meeting of the stockholders was held at No. 45 Broadway; on March 20, 1900, an adjourned meeting of the stockholders was held at the same place; on April 16, 1900, a meeting of the directors was held at the Murray Hill hotel; on May 11, 1900, a meeting of the stockholders was held at No. 45 Broadway; on October 1, 1900, a meeting of the directors was held at the Murray Hill hotel; on February 3, 1901, a meeting of the directors was held at the Murray Hill hotel; and on August 10, 1901, a meeting of the stockholders was held at No. 45 Broadway.

17 Since August 10, 1901, there has been no meeting either of the stockholders or of the directors. On the date last mentioned, the stockholders were informed that the company had no funds with which to pay the franchise taxes which were due to the State of West Virginia, and no funds have since been provided for that purpose. The company, since the date aforesaid, has transacted

no business, has maintained no office in this State, and an action has been commenced by the State of West Virginia against it to forfeit and terminate its corporate franchise.

The sole assets of the company are two automatic looms, the tools and machinery employed in the making thereof and its patents. The looms, machinery and tools are in Attleboro, Massachusetts. They are kept in the machine-shop of the Frank P. Mossberg Company at that place. Mr. Mossberg has made divers attempts to improve the looms. The letters patent are also in Mr. Mossberg's possession, and are in Attleboro, Massachusetts. The company has no bank account, no office force, and no employees. It has never reached the stage of the active transaction of business, and such assets as it possesses are beyond the jurisdiction of this court.

It is not true that I have assumed the complete management of the company's affairs, or that I have undertaken to dispose of its assets. Whatever assets it has received are still owned by it, and are subject to whatever disposition the board of directors may determine to make. So far as the management of the business has been concerned, there has been thus far no business to manage. The inability of the company to place its looms upon the market has resulted in the abandonment of any attempt to transact business and in the virtual extinction of corporate life.

I am advised and believe that under the laws of the State
18 of West Virginia, it was not the duty of the treasurer to call a meeting of the stockholders, and that under section 41 of chapter 53 of the Code of West Virginia, such notice should be called either by the board of directors, or by stockholders holding one-tenth of the capital stock.

The provision of the certificate of incorporation that said "corporation shall keep its principal office or place of business at the city of New York, in the county of New York, and State of New York," has not been complied with; and the corporation has no place of abode within this jurisdiction.

I am advised and believe that the attempted service of the writ of subpœna was and is ineffectual and illegal, and that the same should be set aside.

JOSEPH H. EMERY.

Sworn to before me this 19th day of December, 1904.
W. T. LAING,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) Circuit court of United States, southern district of New York.—Daniel R. Kendall, against The American Automatic Loom Co.—Affidavit and notice of motion.—Simpson, Werner & Cardozo, attorneys for defendant, 52 Broadway, Manhattan, New York.—A copy of the within paper received Dec. 19/04. Merrill & Rogers, attorneys for plaintiff.—U. S. circuit court, southern district of New York, Filed Dec. 19, 1904, John A. Shields, clerk.

19 Circuit Court of the United States, Southern District of New York.

DANIEL R. KENDALL, Complainant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant. } In Equity.

STATE OF NEW YORK,
County of New York, } ss.:

Daniel R. Kendall, being duly sworn, says:

I am the complainant in this suit, and have read the affidavit of Joseph H. Emery, verified the 19th day of December, 1904.

On January 25th, 1904, my attorneys, Messrs. Merrill & Rogers, wrote and mailed to the defendant company the letter annexed hereto, and received in reply the letter also annexed hereto, dated February 6th, 1904, signed by Joseph H. Emery.

On the 7th day of January, 1904, my said attorneys wrote the defendant company requesting the date of the last meeting of the stockholders and a copy of the treasurer's report, and received in reply the letter of January 12th, 1904, signed by said Joseph H. Emery.

In January, 1903, I communicated with Mr. Joseph H. Emery as to the condition at that time of the defendant company as to certain persons who, Mr. Emery said, were looking into the subject of buying the control of the defendant company and as to what work the defendant company was doing in perfecting its looms or models at Attleboro, Massachusetts, and what progress the defendant
20 company was making in its business. In reply to this I received from the said Emery the letter annexed hereto, dated January 20th, 1903, which is signed by the said Emery.

In the spring of 1902 I had several communications with the said Emery concerning the business of the defendant company, its progress in perfecting the model. I received at that time from said Emery as treasurer of the defendant company the letter annexed hereto, dated April 3rd, 1902, which is signed by the said Emery.

I own a certified copy of the certificate of incorporation of the defendant company, and have examined same, and it appears therein that each and every one of the incorporators of the defendant company resided in New York city, New York.

The said Emery, in his affidavit, sets forth numerous meetings of the directors and stockholders of the defendant company, each and all of which occurred in the city, county and State of New York, and I verily believe that the defendant company has had no office in the State of West Virginia, nor has held any of its meetings there, nor has it transacted any business there. I verily believe that all of the business and meetings of the directors and stockholders of the said company that have been held during its entire existence

have been held in the city, county and State of New York, and that each and all of its directors have been residents of said city, county and State.

I therefore request, in case this court desires further evidence on this point, that I may have an opportunity to examine the said Emery under oath as to what business the corporation has
21 done in this State and in the State of West Virginia, where it was incorporated.

DAN'L R. KENDALL.

Sworn to before me this 23rd day of December, 1904.

JOHN C. BARR,
[L. S.] Notary Public, Kings Co.

Certificate filed in N. Y. Co.

22 JANUARY 12, 1904.

DEAR SIRS: I beg to acknowledge receipt of yours of the 7th inst.

The last annual meeting of the stockholders of the American Automatic Loom Company was held on May 11, 1900. The time fixed for the next annual meeting of stockholders is the first Tuesday in May.

If I can find the treasurer's report made at the last annual meeting which was held, I shall send you a copy of same during the current week.

Very truly yours, J. H. EMERY.

Mess. Merrill & Rogers, attorneys for Daniel R. Kendall, stockholder, 31 Nassau street, New York city.

(Copy.)

23 JAN. 25, 1904.

American Automatic Loom Company, Mr. Joseph H. Emery, treasurer.

DEAR SIR: Referring to your favor of recent date, in which you state that the annual meeting has not regularly been held, we now beg to ask of you on behalf of our client, Mr. Daniel R. Kendall, a copy of the annual report of directors required by the corporation laws of West Virginia, which should show the property in funds belonging to the corporation, the estimated value thereof, etc., as provided in section 46 of general regulations; and also a list of stockholders and their places of residence, as in said law further provided.

Kindly let us have the information in question as soon as possible, and so oblige

Yours truly, MERRILL & ROGERS,
Att'ys for Daniel R. Kendall, Stockholder.

(Copy.)

24 NEW YORK, February 6, 1904.

Messrs. Merrill & Rogers, 31 Nassau street, New York city.

GENTLEMEN: I duly received your letter of the 25th ult. in which, in behalf of your client, Mr. Daniel R. Kendall, you requested a copy of the annual report of the directors of the American Automatic Loom Company, under the provisions of section 46 of the general regulations of the Corporation Laws of West Virginia.

In reply thereto I beg to state that, as there has been no annual meeting of the stockholders since the date referred to in my previous letter, it has not been possible that the board of directors should report to the stockholders at the annual meeting concerning the condition of the corporation. I am advised that, as treasurer of the company, I have no authority to prepare a statement which would bind the board of directors.

I am, dear sirs,
Very truly yours, J. H. EMERY.

(Copy.)

25 The Union League Club, New York.

JAN. 20, 1903.

Mr. Daniel R. Kendall.

DEAR SIR: The people I spoke about are now looking into our patents. In the meantime we are continuing with our work at Attleboro.

Yours truly, J. H. EMERY.

(Copy.)

26 Lord & Taylor, New York, Hosiery Department.

APRIL 3D, '02.

Daniel R. Kendall, Esq., Metropolitan Club, city.

DEAR MR. KENDALL: Replying to your communication of current date, I would say that we did visit the manufacturer on Saturday last, and found the new loom for which we have been waiting finished, but not in condition to weave. Some parts had to be smoothed a little before they could begin — make cloth. As all the parts were made by hand this was to be expected. They hope to have the machine in condition to give a practical test the coming Saturday.

However, I received the following letter this morning from which it appears doubtful:

"We are progressing with the loom and have done a little weaving, but as yet it is not toned up to perfection, and while I am in hopes to have it ready for exhibition by Saturday, I am unable to state positively at this writing in regard to this."

However, it is only a question of a few days when I expect this machine will be ready for our inspection. It is far ahead of anything which has been produced and I believe it is a success.

The other loom which they made previous to this one is running and last Saturday ran as high as 210 picks, making cloth as good as any made. I trust this new one will be all right.

I will report to you on my return, or if you care to go up and see the machine in operation, I would be glad to have you accompany me.

Yours truly, J. H. EMERY.

(Copy.)

27 (Endorsed:) U. S. circuit court, southern dist. N. Y.—Daniel R. Kendall, plaintiff, against The American Automatic Loom Co. defendant.—Affidavit in opposition.—Merrill & Rogers, attorneys for plaintiff, 31 Nassau street, New York city.—Motion granted. Dec. 29, 1904. E. H. Lacombe, U. S. C. J. U. S. circuit court, southern district of New York, Filed Dec. 29, 1904, John A. Shields, clerk.

28 At a stated term of the circuit court of the United States for the southern district of New York, held in the Post Office building, in the city of New York, on the 5th day of January, 1905.

Present: Hon. E. Henry Lacombe, circuit judge.

DANIEL R. KENDALL, Complainant,
vs.
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant.

The above-named defendant, having appeared specially herein, for the sole purpose of questioning the jurisdiction of the court, and of moving to set aside the service of the bill of complaint and of the writ of subpœna requiring the defendant to answer said bill of complaint, which service was attempted to be made herein on or about the 13th day of December, 1904; and the said motion having duly come on for argument; upon reading and filing the bill of complaint herein, the writ of subpœna requiring the defendant to answer the same, the notice of special appearance, the affidavit of Joseph H. Emery, verified the 19th day of December, 1904, and the notice of motion for an order setting aside the service of the said writ of subpœna and of the said bill of complaint, and for such other and further order or relief as might be just and proper;

29 and upon reading and filing the affidavit of Daniel R. Kendall, verified the 23rd day of December, 1904; after hearing Mr. Benjamin N. Cardozo, of counsel for the defendant in support of the said motion, and Mr. Alfred Holbrook, of counsel for the complainant, in opposition thereto; now, on motion of Messrs. Simpson, Werner & Cardozo, attorneys for the said defendant, appearing specially for the purpose of said motion only, it is

Ordered, that the said motion be and the same hereby is granted; and it is further

Ordered, that the service of the bill of complaint and of the writ of subpœna herein made by delivery thereof to Joseph H. Emery, treasurer of the defendant, on or about the 13th day of December, 1904, be and the same hereby is set aside and declared null and void.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York—Daniel R. Kendall, against The American Automatic Loom Co.—Order setting aside service of writ of subpœna with notice of settlement.—Simpson, Werner & Cardozo, attorneys for defendant, 52 Broadway, New York.—Gentlemen: Take notice that the within order will be presented for settlement to Mr. Justice Lacombe, at his chambers in the Post Office building in the borough of Manhattan, city of New York, on the 4th day of January, 1905, at 10:30 a. m.—Yours, &c., Simpson, Werner & Cardozo, def't's solicitors 52 Broadway N. Y.—To Merrill & Rogers, Esqs., complainant's 30 solicitors, 31 Nassau St. N. Y.—A copy of the within paper received Dec. 31, 1904. Merrill & Rogers, complainant's solicitors.—U. S. circuit court, southern district of New York, Filed Jan. 5, 1905, John A. Shields, clerk.

31 United States Circuit Court, Southern District of New York.

DANIEL R. KENDALL, Complainant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant.
} Petition on Appeal.

To the honorable the judges of the circuit court of the United States for the second circuit:

Daniel R. Kendall, the complainant above named, considering himself aggrieved by the order made and entered herein on the 5th day of January, 1905, does hereby appeal from said order to the United States Supreme Court for the reasons specified in the assignment of errors which is filed herein, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made duly authenticated may be sent to the United States Supreme Court.

Dated New York, February 17th, 1905.

MERRILL & ROGERS,
Att'ys for Complainant, 31 Nassau Street,
Borough of Manhattan, New York City.

The foregoing claim of appeal is hereby allowed.
Dated New York, February 18, 1905.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed :) United States circuit court, southern district of New York.—Daniel R. Kendall, complainant, against The American Automatic Loom Company, defendant.—Petition on appeal.—Merrill & Rogers, solicitors for complainant, 31 Nassau St., New York city.—Received. Feb. 18, 1905, Simpson, Werner & Cardozo, appearing specially for this motion.—U. S. circuit court, southern district of New York, Filed Feb. 18, 1905, John A. Shields, clerk.

32 The Supreme Court of the United States.

DANIEL R. KENDALL, Plaintiff-Appellant,
against
THE AMERICAN AUTOMATIC LOOM COMPANY, Defendant-Respondent.

Assignment of Errors.

Now, on this 23rd day of January, 1905, comes the said Daniel R. Kendall by Merrill & Rogers his attorneys and says: That in the record and proceedings in the above entitled matter there is manifest error to wit:

I. That the matters set out in the moving papers of the defendant are not sufficient to sustain the order setting aside the service of process in this suit.

II. That the United States circuit court for the southern district of New York has jurisdiction over the defendant corporation by reason of the service of the writ of subpœna made by the United States marshal herein.

III. That the principal office of the said corporation is by its charter fixed and located in the said southern district of New York, by reason of which service of process upon the treasurer of the said defendant who resides in said district is sufficient to confer jurisdiction upon the said circuit court.

IV. That the circuit court of the United States for the southern district of New York erred in setting aside the said service of process.

33 Wherefore said Daniel R. Kendall prays that the order of the said circuit court of the United States for the southern district of New York be reversed.

MERRILL & ROGERS,
Att'ys for Plaintiff-Appellant, 31 Nassau Street,
Borough of Manhattan, New York City.

(Endorsed :) The Supreme Court of the United States.—Daniel R. Kendall, plaintiff, against The American Automatic Loom Co., defendant.—Assignment of errors.—Merrill & Rogers, attorneys for plaintiff, 31 Nassau street, New York city.—U. S. circuit court, southern district of New York, Filed Jan. 23, 1905, John A. Shields, clerk.

34 National Surety Company.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

DANIEL R. KENDALL, Appellant,
vs.
AMERICAN AUTOMATIC LOOM COMPANY, Appellee.
} Bond for Damages and Costs.

Know all men by these presents, that the National Surety Company, having an office and principal place of business at No. 346 Broadway, in the city of New York, county and State of New York, is held and firmly bound unto the above named American Automatic Loom Company, in the sum of two hundred and fifty ($250.) dollars, to be paid to the said The American Automatic Loom Company for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal, and dated the 18th day of February in the year of our Lord one thousand nine hundred and five.

Whereas, the above named Daniel R. Kendall hath prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered in the above entitled suit, by the judge of the circuit court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such, that if the above named Daniel R. Kendall shall prosecute his appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,
[SEAL.] By JOEL RATHBONE,
Res. Vice President.

Attest:

RICHARD J. MORIARTY,
Res. Ass't Secretary.

Sealed and delivered, and taken and acknowledged this 18th day of Feb. 1905, before me,

BELLE F. JAIS,
Notary Public for the County of N. Y., 47.

Certificate filed in Kings, Westchester, Richmond & Queens counties.

35 Copy of By-Law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of Feb. 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII, SEC. 1. All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, "shall be signed by the president, the vice-president, the second "vice-president, a resident vice-president, or an attorney in fact, "and, except when signed by an attorney in fact, shall have "the seal of the company affixed thereto, duly attested by the "secretary, assistant secretary or a resident assistant secretary. The "vice-president, second vice-president and resident vice-presidents "shall each have authority to sign such instruments whether "the president be absent or incapacitated or not; and the assistant "secretary and resident assistant assistant secretaries shall each have "authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments "executed as herein provided shall be as binding upon the company "as if the same were signed by the president, duly sealed and attested by the secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I Richard J. Moriarty, res. ass't secretary of the National Surety Company, have compared the foregoing by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and the seal of the company at the city of New York, this 18th day of February, 1905.

[SEAL.] RICHARD J. MORIARTY,
Res. Ass't Secretary.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 18th day of February, 1905, before me personally appeared Joel Rathbone res. vice president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the res. vice president of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as res. vice president of said company by

like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard J. Moriarty and knows him to be the res. ass't secretary of said company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Joel Rathbone res. vice president.

BELLE F. JAIS,
Notary Public for the County of N. Y., 47.

Certificate filed in Kings, Westchester, Richmond & Queens counties.

[Endorsed:] —— court Bond for damages and costs. Surety: National Surety Company. I approve of the within bond, and of the sufficiency of the surety. —— ——.

36 (Endorsed:) Circuit court.—Daniel R. Kendall, appellant, *vs.* American Automatic Loom Co. appellee.—Bond for damages and costs. Surety: National Surety Company.—I approve of the within bond and of the sufficiency of the surety. E. S. Lacombe, U. S. circuit judge, U. S. circuit court, southern district of New York, Filed Feb. 18, 1905, John A. Shields, clerk.

37 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To the American Automatic Loom Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at Washington, D. C., on the 21st day of February, 1905, pursuant to a petition on appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Daniel R. Kendall is the appellant and you are the appellee, to show cause, if any there be, why the final order in said petition on appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in the city of New York, in the district and circuit above named, this 18th day of February, in the year of our Lord one thousand nine hundred and five, and of the Independence of these United States the one hundred and twenty-ninth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States
for the Southern District of New York,
in the Second Circuit.

(Endorsed:) United States Supreme Court, Daniel R. Kendall *vs.* The American Automatic Loom Company.—Citation.—Received Feb. 18, 1905, Simpson, Werner & Cardozo, appearing specially for this motion.—U. S. circuit court, southern district of New York, Filed Feb. 18, 1905, John A. Shields, clerk.

38 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to thirty-seven inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled Daniel R. Kendall, compl't-appellant, against The American Automatic Loom Company, def't-appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 20th day of February in the year of our Lord one thousand nine hundred and five and of the Independence of the said United States the one hundred and twenty-ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, Clerk.

[Endorsed:] United States Supreme Court. Daniel R. Kendall, compl't-appellant, *vs.* The American Automatic Loom Company, def't appellee. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 19,641. S. New York C. C. U. S. Term No. 541. Daniel R. Kendall, appellant, *vs.* The American Automatic Loom Company. Filed February 24th, 1905. File No. 19,641.

FILE COPY.

FILED
MAR 25 1905
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

against

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541.

Comes now the appellant by his counsel appearing in that behalf, and moves the court to advance the above case on the calendar under rule 32 of the Rules of the Supreme Court of the United States on the ground that this case is brought to this court by appeal under section 5 of the Act of March 3, 1891, chapter 517, in that the only question in issue is the question of the jurisdiction of the Circuit Court for the Southern District of New York.

NOAH C. ROGERS,
Counsel for Appellant,
31 Nassau Street, Manhattan,
New York City.

To Messrs. SIMPSON, WERNER & CARDOZO,
Solicitors for the Appellee, appearing specially for the purpose of questioning the jurisdiction of the court.

Please take notice that on Monday, the 27th day of March, 1905, at the opening of the Court or as soon thereafter as counsel can be heard the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the affiadvit of Noah C. Rogers, verified the 16th day of March, 1905, to be submitted with the said motion in support thereof.

NOAH C. ROGERS,
Counsel for the Appellant,
31 Nassau Street, Manhattan,
New York City.

IN THE SUPREME COURT OF THE UNITED STATES.

DANIEL R. KENDALL,
Appellant,

against

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541.

STATE OF NEW YORK,
County of New York, } ss.:

NOAH C. ROGERS, being duly sworn, deposes and says:

That this action was commenced in the Circuit Court of the United States for the Southern District of New York on the 13th day of December, 1904, by the service of the bill of complaint herein and a writ of subpœna upon one Joseph H. Emery, as Treasurer of the appellee herein, by an United States Marshal; that on the 20th day of December, 1904, the appellee appeared herein specially for the sole purpose of questioning the jurisdiction of the said United States Circuit Court for the Southern District of New York, by Messrs. Simpson, Werner & Cardozo, and on the 23rd day of December, 1904, moved the said Cir-

cuit Court for an order setting aside the said service of the writ of subpoena and bill of complaint herein on the ground that the said service was ineffectual and illegal in that the said Circuit Court had no jurisdiction of the action; that the said motion was granted and an order was entered in the office of the Clerk of the said Circuit Court on the 5th day of January, 1905, setting aside and declaring null and void the said service of the writ of subpoena and bill of complaint herein from which order the appellant appealed to this Court on the 18th day of February, 1905. That the only question at issue in this appeal is the jurisdiction of the said Circuit Court.

NOAH C. ROGERS.

Sworn to before me this
16th day of March, 1905.
HOWARD CARTER,
Commissioner of Deeds,
City of New York.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 25 1905
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of United States.

DANIEL R. KENDALL,
Appellant,

against

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541. Appellant's Brief.

Statement.

This is a motion to advance this appeal to the motion calendar under rule 32 of the Supreme Court rules. It appears from the record of the Bill of Complaint on file with this court that the suit was brought on the equity side of the Circuit Court for the Southern District of New York praying that a receiver be appointed of the property of the defendant corporation. The corporation had been organized under the laws of West Virginia. Plaintiff was a resident of N. Y. City. The suit was brought in the said Circuit Court because of diverse citizenship. The writ of subpœna was served on the defendant by delivering it to its treasurer, Joseph H. Emery, within the Southern District of New York. Thereafter the defendant appeared specially and moved to set the service aside on the ground that the said

Emery was not at the time of said service representing the defendant in said District and an order was made by the said Circuit Court setting aside the said service and refusing to entertain jurisdiction on that ground.

It is from this order the complainant has appealed to this Court.

Assignment of Errors.

I.—That the matters set out in the moving papers of the defendant are not sufficient to sustain the order setting aside the service of process in this suit.

II.—That the United States Circuit Court for the Southern District of New York has jurisdiction over the defendant corporation by reason of the service of the writ of subpœna made by the United States Marshal herein.

III.—That the principal office of the said corporation is by its charter fixed and located in the said Southern District of New York, by reason of which service of process upon the Treasurer of the said defendant who resides in said District is sufficient to confer jurisdiction upon the said Circuit Court.

IV.—That the Circuit Court of the United States for the Southern District of New York erred in setting aside the said service of process.

Points.

This appeal is properly taken to this Court and because the sole question is the Circuit Courts jurisdiction this motion to advance the appeal should be granted.

Gooey *vs.* Morning News, 156 U. S. 518.

Rules U. S. Supreme Court No. 32.

Respectfully submitted,

NOAH C. RODGERS,
Of Counsel for Appellant,
31 Nassau St.,
New York City.

FILE COPY.

Office Supreme Court U. S.
FILED
APR 22 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

against

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904.
No. 541
Appellant's Brief.

Statement.

This is an appeal from an order of the United States Circuit Court, Southern District of New York, granting the appellee's motion to set aside the service of the writ of subpœna on its treasurer (print page 14). The service of the subpœna was set aside on the moving affidavit of Joseph H. Emery, the treasurer served, setting forth that the American Automatic Loom Company is a West Virginia corporation; that it had never manufactured nor sold any merchandise, nor engaged in the business for which it was incorporated; that it has no assets, nor office in the State of New York,

where its treasurer was served, and that those of the corporation's officers who reside in the State of New York are not there officially (print p. 8).

On the other hand, it appears that the certificate of incorporation of the defendant company fixed the principal office of the company in the City, County and State of New York (print p. 2, paragraph 2nd of bill of complaint); that each and every one of the incorporators of the defendant company resided in New York (print p. 11); that all of the meetings of stockholders and directors that were held by the company were held in New York City (print p. 9-11).

The company claims that its sole assets are two looms, some tools and machinery used in making them, and its patents, which are in Attleboro, Massachusetts; that the company has never reached the stage of transacting business, and that an action has been commenced by the State of West Virginia to terminate its corporate franchise by reason of non-payment of taxes (print p. 10). However, it appears from letters submitted by the plaintiff on this motion that on January 20, 1903, certain people were looking at the company's patents, and that it was continuing with its work at Attleboro (print p. 13), and on April 3, 1902, the loom was running as high as two hundred and ten picks and making cloth as good as any made (print p. 14).

Assignment of Errors.

I.—That the matters set out in the moving papers of the defendant are not sufficient to sus-

tain the order setting aside the service of process in this suit.

II.—That the United States Circuit Court for the Southern District of New York has jurisdiction over the defendant corporation by reason of the service of the writ of subpœna made by the United States Marshal herein.

III.—That the principal office of the said corporation is by its charter fixed and located in the said Southern District of New York, by reason of which service of process upon the treasurer of the said defendant, who resides in said District, is sufficient to confer jurisdiction upon the said Circuit Court.

IV.—That the Circuit Court of the United States for the Southern District of New York erred in setting aside the service.

FIRST POINT.

The defendant is subject to the jurisdiction of the New York Court by the provision in its articles of incorporation fixing its principal place of business there.

People *vs.* Trustees of Geneva College, 5 Wendell (N. Y.), 211.

Attorney General *vs.* Oakland Co. Bank, 1 Walker C. L. (Mich.), 90, 97.

Having made it one of the conditions of its creation that its principal place of business should be in the City, County and State of New York (print p. 2, paragraph second of complaint; see also admission of defendant print p. 10 last paragraph Emery's affidavit), it will not be heard now to deny this jurisdiction. The defendant has done nothing to amend its charter, nor to revoke the agency of its treasurer Emery; nor to withdraw its place of business to another jurisdiction.

In Canada Southern R. Co. *v.* Gebhard (109 U. S. 527, 537) it was held "A corporation must dwell in the place of its creation and cannot migrate to another sovereignty, though it may do business in all places where its charter allows and the local laws do not forbid. But wherever it goes for business it carries its charter as that is the law of its existence, and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere."

If strangers dealing with the corporation are thus bound by the terms of its charter much more is the corporation itself estopped from denying a plain condition of its incorporation especially after it has adopted and lived pursuant to the condition in so far as it has existed at all; as will more fully appear in the next point.

LAST POINT.

The service of the writ of subpoena on the defendant's treasurer was sufficient to give the Court jurisdiction.

Amer. Locom. Co. *vs.* Dickson Co., 117 Fed., 972.
McCord Lumber Co. *vs.* Doyle, 97 Fed., 22.
Conn. Mut. Life Ins. Co. *vs.* Spratley, 172 U. S., 602.
Merchants Mfg. Co. *vs.* Grand Trunk Ry. Co., 13 Fed., 358.

If the service in question had been made in 1898, the year of incorporation, instead of 1904, it is difficult to see what valid objection could have been made to it. The charter of the defendant located its principal office or place of business in the City of New York. Its incorporators resided there; its treasurer, who was served, lived there; its directors and stockholders' meetings were held there. In all respects, except in the State of its creation, it was a New York corporation. No steps have been taken since then by the defendant to change the *statu quo;* its charter has not been amended; no office or place of business has been established in another State; no new treasurer or representative residing or acting in another State has been selected; nor have the meetings of directors or stockholders been held anywhere else than in New York; but the defendant claims that it has ceased to do any business;

that its very inactivity has removed it from the jurisdiction of the New York Courts.

That this inactivity was gradual and with no intention to alter its charter as to where its principal place of business should be located is evident. In the year 1901 the last stockholders and directors' meetings were held (p. 9); in 1902 one of the looms was running 210 picks, making cloth as good as any made, and the other was in process of construction (p. 14); in 1903 people were looking into the defendant's patents, and in the meantime the work at Attleboro was continuing (p. 13); in 1904 Mr. Emery writes: "I am advised that, as treasurer of the company, I have no authority to prepare a statement that would bind the Board of Directors;" and in the same year an action had been commenced by the State of West Virginia against it to forfeit and terminate its corporate franchise (p. 10).

It is plain therefore that no steps have been taken to dissolve or wind up the affairs of the corporation by its directors; nor have any steps been taken toward realizing and distributing the proceeds of its patents and other assets, which is the object of this suit.

The sole object of serving the subpœna is to give the corporation notice of the suit. This object was attained here; since the defendant at once appeared specially by its attorneys to object to the service.

Respectfully submitted,

NOAH C. ROGERS,
of Counsel for Appellant,
31 Nassau Street,
New York City.

IN THE

Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

AGAINST

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904.
No. 541.

Affidavit in opposition to motion to advance cause.

STATE OF NEW YORK, }
County of New York, } ss:

BENJAMIN N. CARDOZO, being duly sworn, deposes and says: I am the counsel for the appellee herein. The complainant is a citizen of the State of New York, and a resident of the Southern District of New York. The defendant is a corporation organized under the laws of the State of West Virginia, and is a citizen of that State. The writ of subpœna and bill of complaint were served in the Southern District of New York on the defendant's treasurer. The defendant, appearing specially for that purpose, thereupon moved the Circuit Court to set aside the service on the ground that the defendant was a corporation organized under the laws of West Virginia; that it was not engaged in business and had no property in the State of New York; that its treasurer, on whom process had been served,

was not in the State of New York officially, or as representing any business or interest of the corporation; and that the defendant, under these circumstances, had not been brought into court by any legal service. No question was raised as to the jurisdiction of the subject matter of the cause. The sole question was whether the attempted service of process was effectual and legal. The Circuit Court sustained the defendant's contention that the service was void, and an order was made setting it aside.

I respectfully submit that no question is in issue as to the jurisdiction of the court below.

Sworn to before me, this 23rd day of March, 1905. Benjamin N. Co

(Seal) W. J. Laing

NOTARY PUBLIC, KINGS CO.
CFT. FILED IN N. Y. CO.

IN THE

Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

AGAINST

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541.

BRIEF IN OPPOSITION TO APPELLANT'S MOTION TO ADVANCE THIS CASE UNDER RULE 32.

Statement of the Case.

The complainant is a citizen of the State of New York. The defendant, a corporation, is a citizen of the State of West Virginia. The writ of subpœna and bill of complaint were served in the Southern District of New York on the defendant's treasurer. The defendant, appearing specially for that purpose, thereupon moved the Court to set aside the service on the ground that the defendant was a corporation organized under the laws of West Virginia; that it was not engaged in business, and had no property, in the State of New York; that its treasurer, on whom process had been served, was not in that State officially or as representing any business or interest of the corporation;

and that the defendant under these circumstances had not been brought into court by any legal service. The motion was granted on the authority of Conley vs. Mathieson Alkali Works, 190 U. S., 406; Geer vs. Mathieson Alkali Works, 190 U. S., 429; Goldey vs. Morning News, 156 U. S., 518; Fitzgerald Construction Co, vs. Fitzgerald, 137 U. S., 106; Wabash Western Ry., vs. Brow, 164 U. S., 271; *In re* Keasby, 160 U. S, 221; St. Clair vs. Cox, 106 U. S., 350, and kindred cases. The complainant thereupon prayed an appeal to this Court. The appeal was taken, as it is claimed, under the authority of Section 5 of the Act of March 3, 1891, which provides:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

No certificate of any question of jurisdiction is contained in the record.

The appellant now moves to prefer the case under the 32d rule of this court to the effect that

> "cases brought to this court by writ of error or appeal, under the act of February 25, 1889, c. 236, or under section 5 of the act of March 3, 1891, c. 517, *where the only question in issue is the question of the jurisdiction of the court below*, will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of errors and appeals.

The appellee opposes the motion on the ground that the appeal does not involve a "question of the jurisdiction of the court below," within the meaning of the statute or the rule.

ARGUMENT.

I.

THE QUESTION IN ISSUE IS NOT A QUESTION OF THE JURISDICTION OF THE COURT BELOW WITHIN THE MEANING OF SECTION 5 OF THE ACT OF MARCH 3, 1891, OR WITHIN THE MEANING OF THE 32D RULE OF THIS COURT.

This Court has had occasion in very recent cases to consider the meaning of the statute which allows a direct appeal from the Circuit Court where the jurisdiction of that Court is in issue. It is now settled that the question must affect the jurisdiction of the Circuit Court as a Court of the United States, and not in respect of its general authority as a judicial tribunal. If jurisdiction is challenged, not on grounds peculiar to the power of a Federal Court as such, but on grounds applicable with equal force to any tribunal that renders judgment only after notice and a trial, then there is no question of the jurisdiction of the Circuit Court within the meaning of the statute.

In Courtney vs. Pradt, decided by this Court on January 5, 1905 (Opinions of U. S. Supreme Court, Lawyers' Co-op. Pub. Co., No. 5, Feb. 1, 1905, p. 208), the question was whether an action could be maintained against a foreign executor. The Circuit Court held that it had no jurisdiction of such an action, and dismissed it. On appeal to this Court, the decision was that the jurisdiction of the Court below had been challenged, not in respect of its authority as a Federal Court, but only in respect of its general authority as a judicial tribunal, and hence that the appeal must be dismissed.

The Court, speaking by the Chief Justice, said :

> " The appeal was taken directly to this court, and cannot be maintained unless the case comes within the first of the classes named in section 5 of the judiciary act of March 3, 1891, which gives an appeal or writ of error direct, ' in any case in

which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision' (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat., 1901, p. 5491).

"It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the Circuit court *as a court of the United States, and not in respect of its general authority as a judicial tribunal* (Blythe vs. Hinckley, 173 U. S., 501; Mexican C. R. Co. vs. Eckman, 187 U. S., 429; Louisville Trust Co. vs. Knott, 191 U. S., 225; Bache vs. Hunt, 193 U. S., 523).

"And the general rule is that the certificate is an absolute prerequisite to the exercise of jurisdiction here (Maynard vs. Hecht, 151 U. S., 324). Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as the equivalent to the formal certificate (Huntington vs. Laidley, 176 U. S., 668; Arkansas vs. Schlierholz, 179 U. S., 598).

"But as said by Mr. Justice GRAY, in Huntington vs. Laidley, 'the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction;' that is, of the jurisdiction of the court as a court of the United States.

"No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. No single and definite issue as to the jurisdiction of the Circuit court as a Federal court is presented.

"The case was dismissed for want of jurisdiction over it, as a suit against a foreign executor, in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the Circuit court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the state courts; *or the sufficiency of the service of mesne process to authorize the recovery of personal judgment* (Goldey vs. Morning News, 156 U. S., Wabash vs. Western R. Co., vs. Brow, 164 U. S., 271; De Lima vs. Bidwell,

182 U. S., 1; Conley vs. Mathieson Alkali Works, 190 U. S., 406). It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention *that there was a lack of jurisdiction in the Federal courts as contradistinguished from the state courts.* It did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of section 5. * * *

"In our opinion the appeal was improvidently prosecuted directly to this court, and it must, therefore, be dismissed."

The conclusion reached in that case was supported, it will be observed, by reference to the very cases on which the decision in the case at bar was based (Goldey vs. Morning News; Wabash Ry. Co. vs. Brow; Conley vs. Mathieson Alkali Works). The refusal to assume jurisdiction on the ground that the service of process was insufficient to authorize the recovery of personal judgment, was instanced as affecting the general authority of a judicial tribunal, and not the authority of a Federal Court as such.

In Bache vs. Hunt, 193 U. S., 523, Hunt, as Receiver, filed his petition in the Circuit Court in the foreclosure suit of the Continental Trust Co. of New York vs. The Toledo, St. Louis and Kansas City R. R. Co., Jules Bache and others, asserting that he was entitled, out of certain of the first mortgage bonds foreclosed in the suit, to be reimbursed for amounts paid by him as Receiver in the extinguishment of prior claims which the bonds had been deposited to secure. Bache appeared specially and filed a plea to the jurisdiction of the Court over the subject matter because of the pendency in the Supreme Court of New York of a suit instituted prior to the filing of Hunt's petition by Bache as a judgment creditor, against the Toledo, St. Louis and Kansas City R. R. Co., and the Farmers'

Loan and Trust Co., in which the last-mentioned Company had been appointed Receiver of the securities forming the subject of Hunt's petition on the same day on which the Hunt petition was filed; and of his person because of the insufficiency of the method of service of the order. The plea was overruled. From the decree of the Circuit Court an appeal was taken to this Court, where the appeal was dismissed.

Speaking by the Chief Justice, the Court said:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to the bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal court (Louisville Trust Company vs. Knott, 191 U. S., 225; Blythe vs. Hinckley, 173 U. S., 501).
>
> "Tested by this rule, our jurisdiction fails, and the appeal must be dismissed."

In Louisville Trust Co. vs. Knott, 191 U. S., 225, 232, the Court said:

> "The question presented by the certificate of the Circuit Court is not one of *jurisdiction*, within the meaning of the fifth section of the act of 1891, and the jurisdiction of that court was not 'in issue.' There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a Federal court, to take cognizance of it. * * *
>
> "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its gen-

eral authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

See also:

Blythe vs. Hinckley, 173 U. S., 501.
Mexican C. R. Co. vs. Eckman, 187 U. S., 429.

The rule laid down in these decisions is applicable here.

The question that the Circuit Court decided is not one as to the jurisdiction of the Federal judiciary. That the suit is cognizable in the Circuit Court of the United States for the Southern District of New York has neither been disputed by the appellee nor denied by the Court below. The complainant is a citizen of the State of New York, and a resident of the Southern District of New York; the defendant is a citizen of the State of West Virginia (Shaw vs. Quincy Mining Co., 145 U. S. 444). Indisputably, therefore, there exists that diversity of citizenship which confers jurisdiction of the cause on the Federal Courts. The trouble is that the defendant has not been served with process. An attempt has been made to bring it into court by service of the subpœna on an agent, and the sole question is whether that service was effective. In passing on that question, the Court has been governed, not by any consideration peculiar to the jurisdiction of the Circuit Courts, but by considerations of general jurisprudence, applicable, as this Court has declared, to all tribunals. The very point of the decision is that a judgment recovered against a corporation through service of process on an agent in a State where it is not incorporated and not engaged in business, violates the fundamental rule that a court of justice cannot acquire jurisdiction over the person of another who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in

his behalf (Goldey vs. Morning News, *supra*). This Court, in Goldey vs. The Morning News, 156 U. S., 518, 521, referred to that rule as "an elementary principle of jurisprudence." It held that the rule bound State and Federal Courts alike; and that to permit the recovery of a judgment in violation of its requirements was to impair the constitutional guaranty to the citizen of due process of law. Whether the facts set forth in this record brought the case within the ruling in the Goldey case, and in the cases to the same effect, is a question which the Circuit Court had the right to determine and did determine as an incident to its conceded jurisdiction of the subject matter of the suit. It held that the attempted service was void. In doing this, it did not challenge its jurisdiction as a Federal Court; but it enforced the general rule of jurisprudence, applicable to it in common with all tribunals, that jurisdiction must be exercised on notice to the defendant; and that service of notice on a person who is not the defendant nor authorized to represent the defendant, must be condemned as void.

It may be urged by the appellant that in Conley vs. Mathieson Alkali Works, 190 U. S., 406, where a similar question as to the sufficiency of service was involved, an appeal was taken directly to this Court, and decided on its merits. A sufficient answer is that no question as to the jurisdiction of this Court to entertain the appeal was either considered by the Court or suggested by counsel.

As was said in Louisville Trust Co. vs. Knott, 191 U. S., 225:

> "This Court need not consider itself bound as to a question of jurisdiction because it may have exercised jurisdiction in a case where the question might have been raised, but passed *sub silentio*."

To the same effect, see

New vs. Oklahoma, 195 U. S., 252, 256.
U. S. vs. More, 3 Cranch, 159, 172.

There is nothing inconsistent with the appellee's contention in Galveston Ry. Co. vs. Gonzales, 151 U. S., 497. The question there at issue affected the jurisdiction of the Federal Court *as such*. The question was whether the suit had been brought in violation of Section 1 of the Act of August 13, 1888, which fixed the place of trial as the district of the residence of either the plaintiff or the defendant. The jurisdiction, therefore, was challenged, not on grounds affecting equally all judicial tribunals, but on grounds specially affecting the Federal Courts. There the question was: Had the plaintiff a right to litigate his grievance in that Court at all, whether the defendant was or was not served within its territorial limits? Here no question is raised as to the complainant's right to proceed in the Court which he has selected; the sole question is one of fact, has he served the defendant? In the one case, there was a question of the power of the Circuit Court as such. In the other, there is a question of its general power as a judicial tribunal.

In Mexican Cent. Ry. Co. vs. Pinkney, 149 U. S., 194, no objection, it would seem, was raised as to the right of the court to entertain the appeal. Louisville Trust Co. vs. Knott and New vs. Oklahoma, *supra*, are, therefore, applicable. But in any event the question there was whether a state statute could give to a special appearance the effect of a general appearance so as to enlarge the jurisdiction of the Circuit Court. That was a question affecting the power of the Federal Court as such.

The fact that this Court entertained jurisdiction in Goldey vs. Morning News, *supra*, is without significance. That case was decided in the Circuit Court in 1890, before the passage of the Act of 1891. It has no bearing, therefore, on the power of this Court to entertain an appeal under existing statutes.

On the other hand, in Wabash Ry. Co. vs. Brow, 164 U. S., 271, where a like question as to the validity of service on the agent of a corporation was involved, the

appeal was carried in the first instance to the Circuit Court of Appeals, and reviewed in this Court through writ of *certiorari*.

It is submitted, therefore, that no controlling decision stands opposed to the appellee's contention, and that the contention should prevail.

The Circuit Court has certified no question for review. It has not disputed its jurisdiction of the subject matter of the cause. It has not suggested that the *parties*, if properly brought before it, are beyond its competence, or are rendered immune from prosecution in the circuit courts. It has merely held that the defendant has not yet been served with process. That is not a question of jurisdiction within the meaning of the statute. Suppose that the question had been one of the identity of the person served, and that the Circuit Court on the ground that there had been a mistake of identity, had set aside the service. Would any one claim that its order would involve a question of jurisdiction? With as little reason, can such a claim be made in this case. The jurisdiction of the Court below as a court of the United States, both over the subject matter of the cause and over the person of the defendant, when the defendant shall be served with process, is unchallenged. There is, therefore, no warrant for an appeal directly to this Court.

II.

THE MOTION SHOULD BE DENIED.

Respectfully submitted,
BENJAMIN N. CARDOZO,
Of Counsel for Appellee.

[27176]

IN THE

Supreme Court of the United States.

DANIEL R. KENDALL,
Appellant,

AGAINST

THE AMERICAN AUTOMATIC LOOM COMPANY,
Appellee.

October Term, 1904. No. 541.

BRIEF IN BEHALF OF APPELLEE.

Statement of the Case.

The complainant is a citizen of the State of New York (fol. 3). The defendant, a corporation, is a citizen of the State of West Virginia (fol. 3). The writ of subpœna and bill of complaint were served in the Southern District of New York on the defendant's treasurer (fols. 2, 16). The defendant, appearing specially for that purpose (fol. 12), thereupon moved the Court to set aside the service (fol. 14) on the ground that the defendant was a corporation organized under the laws of West Virginia; that it was not engaged in business, and had no property, in the State of New York; that its treasurer, on whom process had been served, was not in that State officially or as representing any business or interest of the corporation; and

that the defendant under these circumstances had not been brought into court by any legal service (fol. 16). The motion was granted on the authority of Conley vs. Mathieson Alkali Works, 190 U. S., 406, and kindred cases. The complainant thereupon prayed an appeal to this Court. The appeal was taken, as it is claimed, under the authority of Section 5 of the Act of March 3, 1891, which provides:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

No certificate of any question of jurisdiction is contained in the record.

The case has been advanced on the appellant's motion under the 32d rule of this Court.

ARGUMENT.

I.

THE DEFENDANT HAS NO DOMICILE OR ABODE IN THE STATE OF NEW YORK; IT IS NOT ENGAGED IN BUSINESS IN THAT STATE; AND THE SERVICE OF THE SUBPŒNA ON ITS TREASURER WAS INEFFECTIVE TO BRING IT INTO COURT.

The decision of this Court in Conley vs. Mathieson Alkali Works, 190 U. S., 406, has established the rule of law that must govern the decision of this case. It was there held that the residence of an officer of a corporation does not necessarily give the corporation a domicile in the State; that he must be there officially,

representing the corporation in its business, and that service in New York of a summons upon a director of a foreign corporation, who resides in New York, is not sufficient to bring the corporation into Court, where at the time of service the corporation was not doing business in the State of New York.

The facts in that case are very similar to those in the case at bar. There, the corporation was organized under the laws of the State of Virginia. It maintained until December 31, 1900, a plant for the manufacture of soda at Niagara Falls. On that date it conveyed its plant to another corporation. Its principal office was maintained at Providence, R. I., and there it kept its books and records, its office force and its bank account. None of its products, after January 1, 1901, were sold in New York State. A by-law of the company, adopted in 1896, provided that the directors should hold monthly meetings in the City of New York, but it did not appear that meetings had been held in compliance with the by-laws. The fact was that they were held sometimes in Saltville, sometimes in Providence, and in 1901, on two or three occasions, in New York, at the office of R. T. Wilson & Co., bankers in Wall street, a member of which firm was a director of the defendant and one of its principal stockholders.

Upon these facts it was held that the defendant at the time of the service of the summons, was not engaged in business within the State of New York, and that the attempted service was ineffective to confer jurisdiction. The Court said :

> " The principle announced in Goldey v. Morning News, 156 U. S., 518, covers the case at bar. The residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. He must be there officially—there representing the corporation in its business (St. Claire v. Cox, 106 U. S., 350). In other words, a corporation must be doing business there, and, recognizing the necessity of this, the Circuit Court referred that issue to a master. The decision upon

the issue was adverse to the contention of the plaintiff, and we cannot say that it was not sustained by the evidence and the presumptions which must be conceded to the report of a master and the judgment of the lower court. The defendant was competent to convey its property to the Castner Electrolytic Alkali Company, and afterwards make the locality of its own business Providence and Saltville. Whether the transfer to the latter company was fraudulent we certainly cannot decide from this record, and the by-law which provided for a monthly meeting in New York, could not of itself keep the corporation in New York. The testimony is positive that no business of the corporation was done in New York city after the transfer of the Niagara Falls plant; that all of the business of the corporation was conducted at Providence, except that of a purely manufacturing character, which was conducted at Saltville."

To the same effect are many other cases:

Goldey vs. Morning News, 156 U. S., 518.
Fitzgerald Construction Co. vs. Fitzgerald, 137 U. S., 106.
Geer vs. Mathieson Alkali Works, 190 U. S., 429.
Caledonian Coal Co. vs. Baker, 196 U. S., 444.
Sharkey vs. Indiana, &c., Railway Co., 186 U. S., 479.
Wabash Western Ry. Co. vs. Brow, 164 U. S., 271.
In re Keasbey, 160 U. S., 221.
St. Clair vs. Cox, 106 U. S., 350.
Central Grain & Stock Exchange vs. Board of Trade, 125 Fed., 463.
Martin vs. New Trinidad Asphalt Co., 130 Fed., 394.
McGillin vs. Claflin, 52 Fed., 657.
Good Hope Co. vs. Railway Barb Fencing Co., 22 Fed., 635.

The doctrine of these decisions is applicable here. The defendant was incorporated for the purpose of developing a self-feeding loom attachment. It has been unable to place its loom upon the market, and for more

than three years it has been moribund (fol. 17). It has never manufactured merchandise; it has never made a sale; and it has never engaged in the transaction of the business for which it was organized (fol. 16). It has no assets or property in the State of New York, and it has no office or place of business in that State (fol. 16). Those of its officers who reside there, are not there officially or as representing any business or interest of the corporation (fol. 16). The mere residence of directors in a State does not give the corporation a situs in that State. If that were so, a corporation organized under the laws of New Jersey, and engaged in business there exclusively, would be suable in New York if its directors were residents of the latter State. The test is, not where the directors reside, but where the corporation does business. The evidence is uncontroverted that the corporate franchises of this defendant are not exercised within the State of New York. Since August 10, 1901, there has been no meeting either of the stockholders or of the directors (fol. 17). On that date the stockholders were informed that the company had no funds with which to pay the franchise taxes due to the State of West Virginia, and no funds have since been provided for that purpose (fol. 17). The company, as a result of these embarrassments, has transacted no business, has maintained no office, and an action has been commenced by the State of West Virginia to forfeit its corporate franchise (fol. 17). In that action, as appears by the bill of complaint (fol. 8), the defendant is in default, and judgment of forfeiture is expected to be entered at the ensuing term of the Court (fol. 8).

The sole assets of the company are two automatic looms, the tools and machinery employed in the making thereof, and its patents (fol. 17). The looms, machinery and tools are in Attleboro, Mass. They are kept in the machine shop of the Frank P. Mossberg Company at that place (fol. 17). Mr. Mossberg has made several attempts to improve the looms (fol. 17). The letters patent are also in his possession, and

in the same place (fol. 17). The company has no bank account, no office force and no employees (fol. 17). It has never reached the stage of the active transaction of business, and such assets as it possesses are beyond the territorial limits of the Court whose jurisdiction was invoked.

Plainly, under these circumstances, the service must be pronounced invalid *Prima facie*, the residence of a corporation is the State of its origin. If it can ever acquire a residence elsewhere, it can only be through an actual exercise of its corporate powers and functions in some other jurisdiction. If that exercise has ceased, the extension of its residence to a locality other than that of the State of its creation, must also cease. The termination of business, leaves it with no place of abode, except its original domicile. There and there only can it be served with process.

It is true that the certificate of incorporation provides that the "corporation shall keep its principal office or place of business at the City of New York, in the County of New York and State of New York." This requirement has not been obeyed (fol. 18). For the first year of the company's existence the meetings of directors were held at the office of the company's counsel, in the Mills Building, No. 35 Wall street (fol. 16). After that and until August 10, 1901, they were held irregularly at any place where accommodations could be secured. The place commonly selected was the Murray Hill Hotel, where one of the chief stockholders lived. Since August 10, 1901, no meetings have been held anywhere. The requirement of the certificate of incorporation that an office should be maintained in New York could not, unless it were obeyed, keep the corporation in that State. A similar question was involved in Conley vs. Mathieson Alkali Works, *supra*, and the Court met it with the statement that "the by-law which provided for the monthly meeting in New York could not of itself keep the corporation in New York." The presence of a corporation in a State other than

that of its creation is a physical fact. It must be determined, not by words, but by acts; not by what the corporation proposed to do, but by what it did. "For the purpose of suing and being sued in a Circuit Court of the United States, the members of a local corporation are conclusively presumed to be citizens of the State by whose laws it was created and in which alone the corporation has a legal existence." (*Thomas vs. Board of Trustees*, 195 U. S., 207, 210, and cases there cited). The presumption of the law places the corporation in the State of its creation. It may go into other States for the purpose of transacting its business and exercising its corporate functions. But its presence for such a purpose elsewhere than in the State of its origin must be made out, not by evidence that it intended, when organized, to do business and to exercise its functions elsewhere, but by evidence that it carried out that intent in practice.

The cases which attribute controlling force to the designation of the place of business, as contained in the certificate of incorporation, have relation only to the question of the situs of the corporation *within* the State of its origin. They have no bearing upon its situs without that State (*Western Transportation Co. vs. Scheu*, 19 N. Y., 408; *Galveston R. R. vs. Gonzales*, 151 U. S., 496). An artificial presumption fixes the domicile of the corporation in the State of its creation. When it becomes material to inquire within what part of that State the corporation resides, another artificial presumption accepts the statement of the certificate as the test. But that presumption has no place where it is sought to extend the presence of the corporation beyond the State of its creation. It is a presumption which reinforces, but never defeats, the broader presumption that the State which gave the corporation life is the State where it exists. Within that State the corporate situs may be determined by arbitrary rules. Beyond that State it must be determined by physical facts. Within the State of its creation, it exists where

the Legislature provides that it shall exist. Beyond that State it exists where it exercises its corporate franchise. If it has gone into another State, the suitor who urges such a claim is bound to prove it.

This burden, the plaintiff has failed to sustain. The corporation is not doing business here. It is not doing business anywhere. Physical tests failing to determine its situs, there remains only the artificial test, and that test pronounces the State of its creation as controlling. As the corporation can gain a situs elsewhere, only through transacting its business elsewhere, it follows that when business ceases, the situs of its origin becomes exclusive. That the business of this corporation has ceased, has been conclusively proved. The letters of Mr. Emery to the complainant prove nothing to the contrary. They show that the looms have been kept at Attleboro, Mass. (fol. 25); that the attempts to improve them have been made at that place; and the latest suggestion of any prospect of success is contained in the letter of January 20, 1903 (fol. 25), nearly two years before this suit. Since then failure has settled on the enterprise. The inability of the company to place its loom upon the market has resulted in a virtual, if not a nominal extinction of corporate life (fol. 17). The company is dead, except in name; and the shell of corporate existence that remains, is about to be destroyed through the judgment of the Courts of West Virginia, forfeiting the corporate franchise and terminating the corporate life (fol. 8).

II.

THE QUESTION IN ISSUE IS NOT A QUESTION OF THE JURISDICTION OF THE COURT BELOW WITHIN THE MEANING OF SECTION 5 OF THE ACT OF MARCH 3, 1891, AND AN APPEAL DIRECTLY FROM THE CIRCUIT COURT CANNOT BE SUSTAINED.

This Court has had occasion in very recent cases to consider the meaning of the statute which allows a direct appeal from the Circuit Court where the jurisdiction of that Court is in issue. It is now settled that the question must affect the jurisdiction of the Circuit Court as a Court of the United States, and not in respect of its general authority as a judicial tribunal. If jurisdiction is challenged, not on grounds peculiar to the power of a Federal Court as such, but on grounds applicable with equal force to any tribunal that renders judgment only after notice and a trial, then there is no question of the jurisdiction of the Circuit Court within the meaning of the statute.

In Courtney vs. Pradt, 196 U. S., 89, the question was whether an action could be maintained against a foreign executor. The Circuit Court held that it had no jurisdiction of such an action, and dismissed it. On appeal to this Court, the decision was that the jurisdiction of the Court below had been challenged, not in respect of its authority as a Federal Court, but only in respect of its general authority as a judicial tribunal, and hence that the appeal must be dismissed.

The Court, speaking by the Chief Justice, said :

> "The appeal was taken directly to this court, and cannot be maintained unless the case comes within the first of the classes named in section 5 of the judiciary act of March 3, 1891, which gives an appeal or writ of error direct, 'in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court

below for decision' (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat., 1901, p. 5491).

"It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the Circuit court *as a court of the United States, and not in respect of its general authority as a judicial tribunal* (Blythe vs. Hinckley, 173 U. S., 501; Mexican C. R. Co., vs. Eckman, 187 U. S., 429; Louisville Trust Co. vs. Knott, 191 U. S., 225; Bache vs. Hunt, 193 U. S., 523).

"And the general rule is that the certificate is an absolute prerequisite to the exercise of jurisdiction here (Maynard vs. Hecht, 251 U. S., 324). Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as the equivalent to the formal certificate (Huntington vs. Laidley, 176 U. S., 668; Arkansas vs. Schlierholz, 179 U. S., 598).

"But as said by Mr. Justice GRAY, in Huntington vs. Laidley, 'the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction'; that is, of the jurisdiction of the court as a court of the United States.

"No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. No single and definite issue as to the jurisdiction of the Circuit court as a Federal court is presented.

"The case was dismissed for want of jurisdiction over it, as a suit against a foreign executor, in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the Circuit court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the state courts; *or the sufficiency of the service of mesne process to authorize the recovery of personal judgment* (Goldey vs. Morning News, 156 U. S., Wabash vs. Western R. Co., vs. Brow, 164 U. S., 271; De Lima vs. Bidwell, 182 U. S., 1; Conley vs. Mathieson Alkali Works, 190 U. S., 406). It is true that in this case a motion to remand was made, but there was nothing

to indicate that it rested on the contention *that there was a lack of jurisdiction in the Federal courts as contradistinguished from the state courts.* It did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of section 5. * * *

"In our opinion the appeal was improvidently prosecuted directly to this court, and it must, therefore, be dismissed."

The conclusion reached in that case was supported, it will be observed, by reference to the very cases on which the decision in the case at bar was based (Goldey vs. Morning News; Wabash Ry. Co. vs. Brow; Conley vs. Mathieson Alkali Works). The refusal to assume jurisdiction on the ground that the service of process was insufficient to authorize the recovery of personal judgment, was instanced as affecting the general authority of a judicial tribunal, and not the authority of a Federal Court as such.

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pany had been appointed Receiver of the securities forming the subject of Hunt's petition on the same day on which the Hunt petition was filed; *and of his person because of the insufficiency of the method of service of the order.* The plea was overruled. From the decree of the Circuit Court an appeal was taken to this Court, where the appeal was dismissed.

Speaking by the Chief Justice, the Court said:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to the bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal Court (Louisville Trust Company vs. Knott, 191 U. S., 225; Blythe vs. Hinckley, 173 U. S., 501).
>
> "Tested by this rule, our jurisdiction fails, and the appeal must be dismissed."

In Louisville Trust Co. vs. Knott, 191 U. S., 225, 232, the Court said:

> "The question presented by the certificate of the Circuit Court is not one of *jurisdiction*, within the meaning of the fifth section of the act of 1891, and the jurisdiction of that court was not 'in issue.' There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a Federal court, to take cognizance of it. * * *
>
> "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit Court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in

harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

See also:

Blyth vs. Hinckley, 173 U. S., 501.
Mexican C. R. Co. vs. Eckman, 187 U. S., 429.

The rule laid down in these decisions is applicable here.

The question that the Circuit Court decided is not one as to the jurisdiction of the Federal judiciary. That the suit is cognizable in the Circuit Court of the United States for the Southern District of New York has neither been disputed by the appellee nor denied by the Court below. The complainant is a citizen of the State of New York, and a resident of the Southern District of New York; the defendant is a citizen of the State of West Virginia (Shaw vs. Quincy Mining Co., 145 U. S. 444). Indisputably, therefore, there exists that diversity of citizenship which confers jurisdiction of the cause on the Federal Courts. The trouble is that the defendant has not been served with process. An attempt has been made to bring it into court by service of the subpœna on an agent, and the sole question is whether that service was effective In passing on that question, the Court has been governed, not by any consideration peculiar to the jurisdiction of the Circuit Courts, but by considerations of general jurisprudence, applicable, as this Court has declared, to all tribunals. The very point of the decision is that a judgment recovered against a corporation through service of process on an agent in a State where it is not incorporated and not engaged in business, violates the fundamental rule that a court of justice cannot acquire jurisdiction over the person of another who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in his behalf (Goldey vs. Morning News, *supra*). This

Court, in Goldey vs. The Morning News, 156 U. S., 518, 521, referred to that rule as "an elementary principle of jurisprudence." It held that the rule bound State and Federal Courts alike; and that to permit the recovery of a judgment in violation of its requirements was to impair the constitutional guaranty to the citizen of due process of law. Whether the facts set forth in this record brought the case within the ruling in the Goldey case, and in the cases to the same effect, is a question which the Circuit Court had the right to determine and did determine as an incident to its conceded jurisdiction of the subject matter of the suit. It held that the attempted service was void. In doing this, it did not challenge its jurisdiction as a Federal Court; but it enforced the general rule of jurisprudence, applicable to it in common with all tribunals, that jurisdiction must be exercised on notice to the defendant; and that service of notice on a person who is not the defendant nor authorized to represent the defendant, must be condemned as void.

It may be urged by the appellant that in Conley vs. Mathieson Alkali Works, 190 U. S., 406, where a similar question as to the sufficiency of service was involved, an appeal was taken directly to this Court, and decided on its merits. A sufficient answer is that no question as to the jurisdiction of this Court to entertain the appeal was either considered by the Court or suggested by counsel.

As was said in Louisville Trust Co. vs. Knott, 191 U. S., 225:

> "This Court need not consider itself bound as to a question of jurisdiction because it may have exercised jurisdiction in a case where the question might have been raised, but passed *sub silentio*."

To the same effect, see:

New vs. Oklahoma, 195 U. S., 252, 256.
U. S. vs. More, 3 Cranch, 159, 172.

When the precise point that was decided in Shepard vs. Adams, 168 U. S., 618, is considered, it will be found that there is nothing in that decision inconsistent with the appellee's contention. The question there at issue affected the jurisdiction of the Federal Court *as such*. The question was whether the District Court for the District of Colorado was bound by the statutes of the State of Colorado requiring that a summons be made returnable in twenty days, or was free to make its own rules for the issuance of process. That was a question affecting its power as a Court of the United States. The validity of the process itself was questioned. Here the validity of the process is undoubted. The only question is whether the defendant has been found within the territorial limits of the Court.

The same observations are applicable to the case of Galveston Ry. Co. vs. Gonzales, 151 U. S., 497. The question there at issue affected the jurisdiction of the Federal Court *as such*. The question was whether the the suit had been brought in violation of Section 1 of the Act of August 13, 1888, which fixed the place of trial as the district of the residence of either the plaintiff or the defendant. The jurisdiction, therefore, was challenged, not on grounds affecting equally all judicial tribunals, but on grounds specially affecting the Federal Courts. There the question was: Had the plaintiff a right to litigate his grievance in that Court at all, whether the defendant was or was not served within its territorial limits? Here no question is raised as to the complainant's right to proceed in the Court which he has selected; the sole question is one of fact, has he served the defendant? In the one case, there was a question of the power of the Circuit Court as such. In the other, there is a question of its general power as a judicial tribunal.

In Mexican Cent. Ry. Co. vs. Pinkney, 149 U. S., 194, no objection, it would seem, was raised as to the right of the court to entertain the appeal. Louisville

Trust Co. vs. Knott and New vs. Oklahoma, *supra*, are, therefore, applicable. But in any event the question there was whether a state statute could give to a special appearance the effect of a general appearance so as to enlarge the jurisdiction of the Circuit Court. That was a question affecting the power of the Federal Court as such.

The fact that this Court entertained jurisdiction in Goldey vs. Morning News, *supra*, is without significance. That case was decided in the Circuit Court in 1890, before the passage of the Act of 1891. It has no bearing, therefore, on the power of this Court to entertain an appeal under existing statutes.

On the other hand, in Wabash Ry. Co. vs. Brow, 164 U. S., 271, where a like question as to the validity of service on the agent of a corporation was involved, the appeal was carried in the first instance to the Circuit Court of Appeals, and reviewed in this Court through writ of *certiorari*.

It is submitted, therefore, that no controlling decision stands opposed to the appellee's contention, and that the contention should prevail.

The Circuit Court has certified no question for review. It has not disputed its jurisdiction of the *subject matter* of the cause. It has not suggested that the *parties*, if properly brought before it, are beyond its competence, or are rendered immune from prosecution in the circuit courts. It has merely held that the defendant has not yet been served with process. That is not a question of jurisdiction within the meaning of the statute. Suppose that the question had been one of the identity of the person served, and that the Circuit Court on the ground that there had been a mistake of identity, had set aside the service. Would any one claim that its order would involve a question of jurisdiction? With as little reason, can such a claim be made in this case. The jurisdiction of the Court below as a court of the United States, both over the subject matter of the cause and over the

person of the defendant, when the defendant shall be served with process, is unchallenged. There is, therefore, no warrant for an appeal directly to this Court.

III.

THE ORDER SHOULD BE AFFIRMED, OR THE APPEAL DISMISSED.

Respectfully submitted,
BENJAMIN N. CARDOZO,
Of Counsel for Appellee.

Supreme Court of the United States.

No. 541.—October Term, 1904.

Daniel R. Kendall, Appellant, vs. The American Automatic Loom Company.	Appeal from the Circuit Court of the United States for the Southern District of New York.

[May 29, 1905.]

This suit was brought against the defendant, appellee, for the purpose of obtaining a discovery of all the matters referred to in the bill of complaint, and to have a receiver appointed of the assets of the company within the State of New York, and for an accounting by the directors of the defendant, and for other relief.

The bill alleged that the plaintiff, at the time of filing his bill, was a citizen of the United States and of the State, county and city of New York; that the defendant was a stock corporation, organized in March, 1898, and existing under the laws of the State of West Virginia, and was incorporated to engage in the business of manufacturing and selling looms and weaving machinery, and that by its charter its principal office and place of business was in the city, county and State of New York. The bill of complaint, together with a writ of subpœna requiring the defendant to answer the bill, were served in the city of New York upon a person who had been the treasurer of the defendant corporation. Within the proper time the defendant appeared specially, for the sole purpose of questioning the jurisdiction of the court and of moving to set aside the attempted service.

The motion was founded upon the affidavit of Joseph H. Emery, in which he averred, among other matters, that the service of the subpœna had been made upon him in the city of New York, because (as he believed) he had been the treasurer of the defendant corporation; that the domicil and residence of the defendant were in the State of West Virginia; the purpose of its incorporation was the development of a self-feeding loom attachment, which gives to the ordinary loom a continuous supply of filling thread. It was further stated in the affidavit that the corporation was the owner of divers patents, but it had never manufactured merchandise. It had never made a sale, and it had never engaged in the transaction of the business for which it was incorporated. It had no business or assets in the State of New York, and had no office or place of business there, and those of its officers who resided in that State were not there

officially, or as representing any business or interest of the corporation. After the formation of the corporation, and between the years 1898 and 1901 the meetings of the directors of the company were held at different places in the city of New York where accommodations could be secured, sometimes at the office of the counsel of the company in New York and sometimes at a hotel; but since August 10, 1901, there had been no meeting, either of the stockholders or of the directors, and on the last-mentioned date the stockholders were notified that the company had no funds with which to pay the franchise taxes which were due to the State of West Virginia, and affiant averred that no funds had since been provided for that purpose; that since that date the company had transacted no business, had maintained no office in the State of New York, and that an action had been commenced by the State of West Virginia against it to terminate and forfeit its corporate franchise. The sole assets of the company consisted of two automatic looms and tools and machinery employed in the making thereof and its patents. The looms, with machinery and tools, were in Attleboro, Massachusetts. The letters patent were also in the possession of a Mr. Mossberg, in Attleboro, Massachusetts, who had made divers attempts to improve the looms. The company had no bank account, no office force, and no employees. It had never reached the stage of the active transaction of business, and such assets as it possessed were beyond the jurisdiction of the court. No one had been elected treasurer in place of Mr. Emery, so far as the record shows, and he was the treasurer of the company when service was made upon him.

An affidavit in opposition was filed by the complainant, but the facts above set forth were substantially undenied. The Circuit Court, upon the hearing, granted the motion of the defendant to set aside and declare null and void the attempted service on the corporation of the bill of complaint and writ of subpœna by the service thereof upon Joseph H. Emery, on or about the 13th day of December, 1904. The complainant has appealed directly to this court from the order of the Circuit Court setting aside the service of the subpœna.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the Court.

It is objected, in the first place, by the appellee that the appellant had no statutory right to appeal directly to this court from the order setting aside the service of the subpœna. It is asserted that the case does not involve the jurisdiction of the court below within the meaning of section 5 of the act of March 3, 1891, inasmuch as the jurisdiction of the Circuit Court as a Federal court is not questioned, the jurisdiction being denied upon grounds alike applicable to any other judicial tribunal, State or Federal, under the same circumstances. This case is, however, on that